



## International Comparative Jurisprudence



### EFFECTIVE PROTECTION OF CONSUMERS BY THE UCTD IN ORDER FOR PAYMENT PROCEDURE: THE ESTONIAN EXAMPLE<sup>1</sup>

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**Abstract.** The order for payment procedure is a simplified procedure used in many member states of the EU. The procedure is highly formal and usually no substantial evidence is assessed in the course of the procedure. This is also the case in Estonia, where this procedure is used very frequently against consumers. The CJEU has, in several cases, assessed the national rules of Member States regarding the order for payment procedure and explained in which cases these rules are not in line with the purpose of the UCTD. In this article, Estonian legislation is used as an example to show that as the EU law does not address the order for payment procedure directly, the protection of consumers' rights depends on the specificities of national procedural law. Even if the member state's legislation is in compliance with the positions expressed by the CJEU, the order for payment procedure might not effectively ensure the protection required under the UCTD. This is so because, under the existing CJEU practice, the court does not have to demand submission of evidence, and sellers and suppliers can thus avoid the controls on unfairness in the standard terms quite easily. This paper also analyses whether it would be acceptable to fully delegate the order for payment procedure to computer systems including artificial intelligence, as it has been suggested to do in Estonia.

**Keywords:** unfair contract terms in consumer contracts, order for payment procedure, European Payment order regulation, CJEU practice regarding order for payment procedure

### Introduction

The order for payment procedure is a simplified procedure which is faster, easier, and cheaper than an action. In Estonia, the order for payment procedure involves filing a claim with a court for payment of a certain amount of money. The court then issues a proposal for payment to the opposing party on the basis of the claim and, if no objections are lodged against the proposal for payment, an order for payment is made which is subject to immediate enforcement. Only if the debtor objects to the proposal for payment will the procedure continue as an ordinary action (see the Code of Civil Procedure [CCIP], passed on 20 April 2005, entry into force on 1 January 2006 § 481 ff). The order for payment procedure follows a similar path in many EU Member States (European Commission, 2017, p. 226). This procedure is characterised by a high degree of formality and the fact that, as a rule, no substantial evidence is assessed in the course of the procedure. In Estonia, this procedure has sometimes been described as a 'post office duty' which in the future could be performed by artificial intelligence (Mandri, 2019).

The order for payment procedure is a highly important and frequently used procedure in Estonia – in 2018 alone there were 32,403 order for payment procedures (Justiitsministeerium, 2018). There is no accurate overview of the number of cases of order for payment procedure which have been initiated against consumers, but this

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procedure is certainly often used against consumers. In comparison, consumers approached the Consumer Disputes Committee in only 3246 instances in 2017 (Tarbijakaitseamet, 2018). Consequently, the order for payment procedure concerns a significantly larger number of consumers than the ADR (alternative dispute resolution) procedure for consumer disputes.

In practice, the order for payment procedure often allows the creditors to successfully assert claims that are based on unfair contract terms. According to the Court of Justice of the European Union (CJEU), this is not in line with the purpose of Articles 6(1) and 7(1) of the Unfair Contract Terms Directive (UCTD) (Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, 1993). The Court has concluded on several occasions, e.g. in cases *Banco Español de Crédito* (*Banco Español de Crédito SA v. Joaquín Calderón Camino*, 2012), *Finanmadrid* (*Finanmadrid SA v. Jesús Vicente Albán Zambrano and Others*, 2016), *Profi Credit Polska* (*Profi Credit Polska S.A. w Bielsku Białej v. Mariusz Wawrzosek*, 2016), *PKO Bank Polski* (*Powszechna Kasa Oszczędności [PKO] Bank Polski S.A. v. Jacek Michalski*, 2018), and *Bondora* (*Bondora AS v. Carlos V. C. XY*, 2019), that the national order for payment procedure rules in some Member States do not allow the court to assess the potential unfairness of the terms.

As there are currently already several judgments of the CJEU relating to this topic, the Member States could be expected to know the extent to which courts should review standard terms in the course of the order for payment procedure, and to have introduced the respective amendments to their national legislation. This paper, however, aims to show, using the Estonian legislation as an example, that in a situation where the EU law does not address the order for payment procedure directly, protection of consumers' rights depends on the specificities of national procedural law, and therefore the level of consumer protection based on the UCTD might not be uniform for all consumers in the EU. This should not be the case. Whereas the EU attempts to raise the level of protection of consumers' rights within the framework of the New Deal (European Commission, 2018), providing, *inter alia*, penalties applicable in case of infringements of unfair contract terms, the rights of consumers in relation to unfair contract terms are actually protected in very different ways from one Member State to another. In addition, this article also demonstrates that the settlement of claims arising from consumer contracts cannot be fully delegated to computer systems, including artificial intelligence, and that for as long as the CJEU does not oblige courts to ask for evidence from the creditors there is nothing in reality to prevent creditors from asserting claims based on unfair terms against consumers.

## 1. The Principle of Procedural Autonomy

Effective consumer protection requires, in addition to substantive law rules, adequate procedural tools for enforcement (Trstenjak, 2013, p. 452). To date there are relatively few procedural law acts in the EU law, mostly due to the principle of procedural autonomy of the Member States. According to this principle, national civil procedure law does not generally fall within the competence of the European legislator, and consequently the Member States are free to draw up these rules at their own discretion (Ebers, 2010, p. 825; Rösler, 2012, pp. 236, 243). Nevertheless, this principle has not been absolute for some time already and in the Member States' civil procedure and even the enforcement procedure there is a need to take into account the limits set by EU law (European Commission, 2019; van Duin & Leone, 2019, p. 24; Trstenjak, 2013, p. 453; Kalamees & Sein, 2017, p. 116) due to the principles of equivalence and effectiveness (see also *Banco Español de Crédito, SA v. Joaquín Calderón Camino*, 2012). The latter – meaning that domestic procedural rules should not make it impossible or excessively difficult to apply the protection granted to the consumers by the UCTD – has become especially important in the CJEU case law. This is because the UCTD seeks to (a) prevent a consumer from being bound by an unfair contract term (Art 6 of the UCTD), and (b) ensure that, in the interests of the consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair contract terms in contracts concluded with consumers (Art 7 of the UCTD), while the principle of effectiveness means that the procedural rules of a Member State must not render the achievement of these aims impossible or excessively difficult (*Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, 1995).

The CJEU has stressed that every case in which the question arises as to whether a national procedural provision makes the application of European Union law impossible or excessively difficult must be analysed by reference to the role of that provision in the procedure, the progress of the procedure, and its special features, before the various national bodies (*Banco Español de Crédito, SA v. Joaquín Calderón Camino*, 2012). The following parts of this article are dedicated, first, to describing the cases where the CJEU has found that the national order for payment procedure makes the application of the UCTD rules impossible or excessively complicated. Thereafter, based on the CJEU case law, we evaluate the compliance of the Estonian national order for payment procedure rules with the EU law.

## 2. Order for Payment Procedure Under Estonian Law

### 2.1. Case Study

In order to make it easier to understand the order for payment procedure in Estonia, the analysis set out in this article is based on the following case study. Paul has rented a Tesla Model S vehicle from OÜ X for four days. The company OÜ X is leasing different Tesla models, and the company enters into contracts with its clients using standard contract terms. Under the lease contract, Paul has to pay rent for the use of the car at €199 per day, i.e. €796 for four days. In addition, the contract contains a clause whereby Paul has to pay a contractual penalty of €100 for exceeding the speed limit by more than 40 km/h with the car, plus €10 per every 1 km/h by which the speed limit is exceeded (it is possible to lease the same car model on exactly the same terms in Estonia; see Tesla Rent, n.d.).

Paul drives the car at the speed of 111 km/h in an area where the speed limit is 70 km/h. As the smart car records its speed and location, OÜ X requests Paul to pay, in addition to €796, the contractual penalty in the amount of €510 (100+41x10) when the car is returned. Paul refuses to pay anything at all to OÜ X, and OÜ X decides to claim €1,306 from Paul via the order for payment procedure.

Estonian law does not have a specific provision stipulating that a standard term introducing a certain amount of contractual penalty is invalid. Pursuant to clause 42 (3) 5) of the Law of Obligations Act (passed on 26 September 2001, entry into force on 1 July 2002), a standard term is considered to be invalid in a consumer contract if it obliges the consumer, in the event of non-performance of the consumer's obligations, to pay an unreasonably high contractual penalty to the party using the term, or an unreasonably high predetermined amount of compensation for damages or other compensation. The contractual penalty agreed between Paul and OÜ X in the standard terms does not have the function of compensation for damage (as regards different functions of the contractual penalty in Estonian law, see Varul et al., 2016, p. 810), as the obligation to pay the penalty for exceeding the speed limit is up to Paul, and not OÜ X, to perform (Traffic Act, passed on 17 June 2010, entry into force on 1 July 2011). However, such a contractual penalty has a preventive purpose, i.e. OÜ X uses the respective term to prevent Paul from exceeding the speed limit while driving the car. In order to assess whether the given contractual penalty is unfair, it must be assessed how severe the violation is, what the economic position of the parties is, their interest in the performance, etc. (Varul et al., 2016, p. 826) in short – how justified the collection of the respective amount is (Varul et al., 2016, p. 234). Considering that the car is rented at the price of €199 per day, and that the exceeding of the speed limit does not present any significant consequences to OÜ X, it can be concluded that the contractual penalty agreed under the contract between Paul and OÜ X is unreasonably high, and the respective standard term is therefore invalid.

If OÜ X filed its claim against Paul in an action, the court hearing the action would have the *ex officio* obligation to determine the validity of the respective standard term pursuant to the EU law (*Pannon GSM Zrt v. Erzsébet Sustikné Győrfi*, 2009; *VB Pénzügyi Lízing Zrt v. Ferenc Schneider*, 2010), and the claim of OÜ X for contractual penalty would not be satisfied. From the viewpoint of Estonian law, this is a matter of applying the law, which is a task that the court performs regardless of the parties' pleadings (the so-called *iura novit curia* principle; Kalamees

& Sein, 2017, p. 118). This would ensure the protection of Paul as a consumer against unfair standard terms. Is the situation the same if OÜ X decides to file its claims against Paul via the order for payment procedure?

## 2.2. Petition for Payment Order

In Estonia, the order for payment procedure is a formalised online procedure for the collection of monetary claims in the amount of up to €6400. A respective petition for the initiation of the procedure shall be filed digitally via an electronic environment [www.etoimik.ee](http://www.etoimik.ee) (subsection 482 [4] of the CCIP). The petition cannot be filed in any other manner than electronically (an application for the European order for payment can also be filed on paper pursuant to Article 7 [5] of Regulation [EC] No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure). In the *e-toimik* environment, the required fields in the form provided are to be filled in order to file the petition for the payment order.

The data which must be presented in the petition for the payment order are not many and they are not detailed. Under subsection 482 (1) of the CCIP, the petition shall set out: the data of the parties and their representatives; the data of the court with which the petition is filed; the sum of money claimed (the main claim and any collateral claims shall be set out separately, and in case a penalty interest for late payment is calculated, the rate of the interest for late payment and the period for which it is calculated shall be indicated); a short description of the circumstances which constitute the basis for the claim; a short description of the evidence, which the petitioner would be able to use in an action in proof of the claim; confirmation that the claim is due and does not depend on the performance of a mutual obligation, or that such obligation has been performed; confirmation that the petitioner has presented the information honestly and according to his or her best knowledge, and that he or she is aware of the fact that presentation, knowingly, of false information to the court may result in criminal liability; and the particulars of the court which, according to jurisdiction, is authorised to deal in an action with the claim which is the object of the order for payment.

In the case described above, OÜ X should therefore set out data regarding itself and Paul in the petition for the payment order. Further, OÜ X has to set out the amount of the main claim against Paul (€796) in the respective field, and select the type of document on which the claim is based from the menu (e.g. contract, invoice, call letter, reminder, order, or other). As for the contractual penalty, OÜ X has to select in the menu that it claims the contractual penalty and enter the amount of the contractual penalty (€510).

Next, OÜ X has to select the type of the basis of the claim from the menu – in the given case it would be the contract for use – and add a specifying description, for example, the title of the contract. In addition, the petitioner shall also enter in the system a short description of the circumstances which constitute the basis for the claim. The person filing the petition may set out the specific provisions of the contract under which the debt has occurred, but is not required to do so (the situations where a specific provision is submitted to the court are very rare in Estonia). In the given case, let us assume that OÜ X will copy the relevant provisions of the contract into the information system, and add the information that Paul has not paid the rent in time and has violated his contractual obligations by exceeding the speed limit.

Then, OÜ X has to present a list of the evidence which it would be able to use in order to substantiate its claim in the action. At least one piece of evidence shall be indicated while filing the petition. The evidence itself is not appended to the form by the petitioner.

Thereafter, OÜ X must confirm that the claim is due and is not dependant on the performance of a mutual obligation, or that the mutual obligation has been performed, and that it has submitted the data in a truthful way and is aware of the potential criminal liability for submission of incorrect information.

Now OÜ X has done everything necessary for initiating the order for payment procedure, and may wait for the results.

## 2.3. Resolution of Petition for the Payment Order

### 2.3.1. What Does the Court Assess?

The court shall resolve a petition for the payment order within 10 working days after the receipt thereof (subsection 483 [1] of the CCIP). It is a formal process and no determination of the substance is carried out (Judgment of the Civil Chamber of the Supreme Court, 2014c, p. 13). The verification of submitted data is extensively automated due to the use of the electronic system for filing of data. The whole system has been set up in such manner that it would not be possible to file the petition for the payment order unless the required fields specified in the previous chapter had been filled in.

If the petition is accepted and there are no grounds for dismissal, the court issues a proposal for payment. A petition for the payment order can be denied only in limited cases, as set out in subsection 483 (2) of the CCIP.

Under subsection 481 (1) of the CCIP, the petition is denied if the claim is not based on a private law relationship, is not seeking to obtain payment of a certain sum of money, or is not due. Furthermore, as a rule, a claim may not be noncontractual, be seeking to obtain compensation for immaterial damage, or be directed against a bankrupt person (Kõve et al., 2018, p. 171). As in our case OÜ X has a contractual claim against Paul and Paul is not bankrupt, the respective claim can be resolved by the order for payment procedure.

Pursuant to subsection 481 (2<sup>3</sup>) of the CCIP, the order for payment procedure may not be used for claims over €6400 (the main claim and collateral claims in total), which is not exceeded in our case.

A petition for the payment order is also not accepted insofar as the amount of collateral claims exceeds that of the main claim (subsection 481 [2<sup>1</sup>] of the CCIP). If the amount of collateral claims still exceeds the amount of the main claim, the petitioner can claim collateral claims by the order for payment procedure only to the extent not exceeding the main claim. The objective of this provision is to restrict award of usurious collateral claims namely in the case of consumer contracts, and thereby provide more protection to consumers (Kõve et al., 2018, p. 159). In the given case, there is no problem with meeting this prerequisite, as the main claim amounts to €796 and the contractual penalty claimed from Paul by OÜ X amounts to €510.

It is important to note that the validity of the contractual penalty clause is not assessed here. Even if the contractual penalty clause agreed upon between Paul and OÜ X is an evidently unfair standard term, the petition for the payment order cannot be denied on this ground, as the absolute amount of the contractual penalty claimed by OÜ X does not exceed the amount of the main claim.

Under Estonian order for payment procedure law, it is possible to carry out the unfairness control of standard terms only to a very restricted extent.<sup>3</sup> The only exception is clause 481 (2<sup>3</sup>) 2) of the CCIP, according to which a petition for the payment order shall be denied if the rate of interest for late payment agreed on with the consumer exceeds triple the rate of interest for late payment provided for by law (a petition for the payment order can also be denied in case the parties have agreed on an excessively high interest rate in a contract (CCIP § 481 [23] 1), but in such a case it does not constitute a substantive review of standard terms). The given restriction has been inspired by the judgment on *Banco Español de Crédito SA*, whereby the courts of Member States must have the opportunity to assess the unfair nature of standard terms containing the rate of interest for late payment (*Banco Español de Crédito, SA v. Joaquín Calderón Camino*, 2012). The triple amount of interest for late payment, as provided for by law, derives from the position of the Estonian Supreme Court that a standard term in a consumer contract whereby the agreed rate of interest for late payment exceeds three times the statutory rate of interest for late payment is invalid (Judgment of the Civil Chamber of the Supreme Court, 2016, p 13). Therefore, if standard

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<sup>3</sup> It has to be noted that some questions related to the permitting of the petition for the payment order are not a matter of unfairness control of standard terms, but are regulated directly in the CCIP. One example of this would be an agreement between a seller or a supplier and a consumer conferring jurisdiction to the court in the territorial jurisdiction of which the trader has their principal place of business. This kind of agreement is invalid according to CCIP § 106 (1).

terms include an arrangement on an interest for late payment rate exceeding the respective rate, it is obvious that the respective standard term is invalid. The purpose of clause 481 (2<sup>3</sup>) 2) of the CCIP has been to align the Estonian order for payment procedure with the EU law (Kõve et al., 2018, p. 152). This attempt has been successful in part, as claims cannot be enforced in the course of the order for payment procedure based on an evidently invalid arrangement on interest for late payment. However, while returning to the example specified in this article, clause 481 (2<sup>3</sup>) 2) of the CCIP does not prevent OÜ X from claiming an unreasonably large contractual penalty from Paul.

After the judgment on *Banco Español de Crédito SA*, the academics of Estonia wondered whether this judgment meant that the entire order for payment procedure would vanish, or whether at least the procedural rules should be significantly changed (Kõve, 2012, p. 671; Sein, 2013, p. 40). However, the Estonian order for payment procedure has undergone relatively minor changes after the judgment on *Banco Español de Crédito SA*, and the procedure itself has not changed to a considerable extent. The amendments to the CCIP at the beginning of 2018 only touch on a situation where claims based on standard terms provide for an excessive rate of interest for late payment. The amendment of the CCIP does not provide for any possibility for determining the unfairness of any other standard terms (Kõve et al., 2018, p. 143), as is also illustrated by the case study on OÜ X and Paul.

### 2.3.2. Who Resolves the Petitions?

When a petition for the payment order is received via the electronic system, it will be resolved by an assistant judge (subsection 489<sup>2</sup> [1] of the CCIP; Kõve et al., 2018, p. 230. Misleading information on this is set out in: European Commission, 2017, p. 227 where it is stated that in Estonia, the matters of the order for payment procedure are heard by a judge). Pursuant to subsection 114 (1) of the Courts Act (passed on 19 June 2002, entry into force on 29 July 2002), an assistant judge is a court official who performs the duties specified by law. Therefore, it is not a judge who would be able to apply law (Judgment of the Civil Chamber of the Supreme Court, 2014a, p 44.6; Judgment of the Civil Chamber of the Supreme Court, 2014b, p 59). An assistant judge verifies the compliance of a petition with the requirements of § 481 of the CCIP only formally, i.e. whether the respective data are set out in the petition, whereas the correctness of the data is to be presumed (Kõve et al., 2018, p. 172).

The competence of an assistant judge in the resolution of matters of the order for payment procedure has been found to be problematic in the Estonian legal literature (Kõve et al., 2018, p. 232). The main reason behind this is that an assistant judge has no competence to apply law. Therefore, an assistant judge should not assess any circumstances which have an important bearing on the administration of justice, such as the invalidity of standard terms. Subsection 595 (2) of the CCIP still requires an assistant judge to refer the making of a decision to the judge in more complicated matters. For example, an assistant judge shall refer the making of a ruling to a judge if the law of another state is to be applied, legal complications become evident when reviewing a petition, or if in the opinion of the assistant judge, the provision subject to application is contrary to the Constitution or European Union law. In the light of UCTD, this provision should be interpreted in such a manner that, in case the invalidity of a standard term is clear to an assistant judge, he or she shall refer the making of a ruling to the judge in the course of the order for payment procedure (according to the commented CCIP, there are no rules which would enable one to ascertain whether a case is legally complicated or not. Therefore, the decision on whether a case should be referred to a judge is made by the assistant judge. Also, the referral of a case to a judge on the suspicion that an applicable provision is in conflict with the EU law does not mean that there is certainly a conflict, and a suspicion is a sufficient reason for referral. See Kõve et al., 2018, p. 753). The Estonian judge then has the right to assess the validity of a standard term (Kõve et al., 2017, p. 1007, 1010) and, if invalidity is determined, not to make a proposal for a payment order or an order for payment (CCIP subsections 463 [2] and 436 [1] are applicable, according to which the ruling of the court has to be legitimate, see note 52, p. 1260. The situation is also similar to the German ZPO that has been a source of inspiration for the Estonian legislator, see Musielak & Voit, 2019, ZPO § 691, 2).

The court's right to act in the manner described is also supported by subsection 489<sup>1</sup> (2) of the CCIP, according to which, in an appeal against the order for payment, the debtor may rely on the fact that the claim for whose collection the corresponding proceedings were conducted is clearly unfounded. If the claim is founded on an invalid standard term, then there exists a ground for annulling the order for payment and the district court has an obligation to annul such a payment order (subsection 489<sup>1</sup> [4] of the CCIP). It would be unthinkable that the first instance should have an obligation to make an order for payment that is based on a clearly invalid standard term and is without a doubt annulable by the district court. Nevertheless, it has to be noted that the regulation of the CCIP on the court's right to assess the validity of standard terms is definitely neither clear nor unambiguous.

The right to refer the making of a ruling to a judge is not a widely used practice by the assistant judges in the course of this procedure (Kõve et al., 2018, p. 233). This means that it is not very likely in the course of the order for payment procedure that a petition for the payment order would be denied for the reason that the underlying claim is based on an unfair standard term.

The issue of who is competent to resolve petitions for the order of payment procedure has been elaborated on by the Court of Justice in the case *EOS KSI Slovensko s.r.o v. Jan Danko, Margarita Dankova* (2018). In this case, the petition for the order for payment was resolved by an officer of the court, and not by a judge, in accordance with Slovenian law. However, differently from Estonian law, the respective officer had the right to assess the potentially unfair nature of the standard terms of the contract underlying the order for payment. According to the CJEU, the effectiveness of the UCTD is not limited by the fact that the order for payment procedure is carried out by court officials and not by judges as long as the court is able to determine the potential invalidity of the standard terms, either upon enforcement of the order for payment or in case the consumer files an objection in the course of the procedure (*EOS KSI Slovensko s.r.o v. Jan Danko, Margarita Dankova*, 2018). CJEU underlines that it was necessary for ensuring the effectiveness of the UCTD that national legislation would not make the submission of objections so complicated that the consumer would rather give up the respective right (*EOS KSI Slovensko s.r.o v. Jan Danko, Margarita Dankova*, 2018). Essentially, the CJEU has held in this judgment that even the unfairness control of standard terms by an officer of the court does not ensure sufficient protection for consumers, and it is necessary that the judge would still be able to assess the potential unfairness at some procedural stage (European Commission, 2019, p. 63).

While evaluating the national law in the light of this judgment, it can be concluded that Estonian law is in compliance with the UCTD as regards the person conducting the procedure. The CCIP does not allow the assistant judge to decide on the validity of standard terms, but enables him or her to refer the order for payment procedure to a judge if, in his or her opinion, the applicable provision is contrary to the EU law, or if legal complications arise in the hearing of the matter. Furthermore, the filing of an objection is a lot easier for a consumer under the CCIP than under Slovenian law (see Chapter 5.2.2., and regarding Slovenian law case *EOS KSI Slovensko s.r.o v. Jan Danko, Margarita Dankova*, 2018).

### **2.3.3. Making Proposal for Payment and Order for Payment**

If the court grants the petition for the payment order, the court makes a proposal for payment by an order (subsection 484 [1] of the CCIP), and delivers the proposal for payment and a form for an objection to the debtor, and also informs the petitioner of the forwarding of the proposal for payment (subsection 484 [3]). A proposal for payment is actually the court's call to the debtor to pay the requested amount or to file objections to the claim (Kõve et al., 2018, p. 180). In this stage of the order for payment procedure the court, as a rule, does not determine the circumstances related to the claim, including the potential unfairness of standard terms.

If the debtor does not file an objection to the proposal for payment and does not pay the amount indicated in the proposal for payment, the court issues an order for payment for the collection of the respective amount (subsection 489 [1] of the CCIP). As a rule, the court does not determine the substance of the claim before issuing the order for payment either. The order for payment is subject to immediate enforcement regardless of the service of the payment order on the debtor (subsection 489 [7] of the CCIP). Therefore, if the debtor does not file any objections to the proposal for payment and the assistant judge has not referred the matter to the judge for the unfairness

control of a standard term, the court never actually assesses the substance of the claim in the course of the procedure. Thus, the claim of OÜ X against Paul would be granted without any determination of the substance of the claim, irrespective of the fact that it is partially based on an unfair and invalid standard term.

### **3. Compliance of Estonian Rules for Order for Payment Procedure with the Case Law of the CJEU**

#### **3.1. Cases Where the Unfairness of Standard Terms is Evident**

It has been emphasized already in the decision of 2012 on the case *Banco Español de Crédito SA (Banco Español de Crédito, SA v. Joaquín Calderón Camino)*, 2012) that the specific type of procedure and the rules of procedure must not prevent courts from reviewing the contents of unfair standard terms (Beka, 2018, p. 240). In this judgement, the CJEU stated that:

the court before which an application for an order for payment has been brought should have the right to assess of its own motion, *in limini litis* or at any other stage during the proceedings, whether a term concerning interest on late payments contained in a contract concluded between a seller or a supplier and a consumer is unfair, in the case where that consumer has not lodged an objection. The court has such a right when it already has the legal and factual elements necessary for that task available to it (*Banco Español de Crédito, SA v. Joaquín Calderón Camino*, 2012).

Consequently, the CJEU concluded that a national court had to have the right to assess whether a standard term was invalid, and also declare the respective term invalid in the course of the order for payment procedure, if the unfair nature of the standard term was clear (Trstenjak, 2013, p. 472; Musielak & Voit, 2019, ZPO § 691, p. 2). At the same time, the national court has the right to act *ex officio* and without any initiative from the consumer (Musiellak & Voit, 2019, ZPO § 688, p. 2). After the court ascertains that such a standard term exists, it may refuse to issue an order for payment. It is important to keep in mind that in the judgment on *Banco Español de Crédito SA*, the court concluded that national courts must have the right to determine the validity of standard terms, but did not state that the court had the obligation to do so. However, it can be concluded from this judgment that the national order for payment procedure must enable the courts to determine the potential invalidity of standard terms of its own motion if no additional circumstances need to be ascertained for this purpose (Musiellak & Voit, 2019, ZPO § 691, p. 2; Kalamees & Sein, 2017, p. 120).

In 2016, the CJEU specified the relationship between the order for payment procedure and UCTD in the case of *Finanmadrid (Finanmadrid EFC SA v. Jesús Vicente Albán Zambrano and others)*, 2016). In the respective judgment, the CJEU expressed the view that the national rules for the order for payment procedure, which did not enable the court that carried out the order for payment procedure or the court that made a decision on the enforceability to assess *ex officio* the invalidity of the standard terms regarding the enforceability of an order for payment, were not in compliance with the UCTD (*Finanmadrid EFC SA v. Jesús Vicente Albán Zambrano and others*, 2016). It follows that, in the opinion of the CJEU, the national court must have the right to determine the validity of standard terms in at least some stage of the order for payment procedure. It should be clear from the data set out in the petition for the payment order filed against Paul by OÜ X that the claim is based on an unfair standard term. As Estonian law enables an assistant judge to refer the making of a ruling to a judge who will be able to determine the invalidity of the standard term and deny the issue of the order for payment, the Estonian rules for the order for payment procedure are *per se* in compliance with the UCTD (Köve et al., 2018, p. 145).

Therefore, even if Paul does not file an objection to the proposal for payment, the Estonian court will be able to assess the potentially (in truth already quite clear) unfair nature of the terms of the contract between Paul and OÜ X, and the law ensures that Paul will have effective protection as prescribed by the UCTD.



## 3.2. Cases Where the Unfairness of Standard Terms is not Evident

### 3.2.1. CJEU Case Law

#### 3.2.1.1 National Order for Payment Procedure

The situation is more complicated in cases where the claim is based on a standard term, in which unfairness is not clear to the court. In practice such cases are prevailing in the Estonian order for payment procedure. As stated in clause 3.2., pursuant to the CCIP the petitioner is not obliged to file with the court a contract or a term of a contract underlying its claim against the consumer. Furthermore, many claims filed in the order for payment procedure are based on an acknowledgement of obligation. By an acknowledgement of obligation, a consumer may acknowledge the existence of an obligation deriving from an invalid standard term. For example, Paul signs an acknowledgement of obligation where he acknowledges that he owes €1306 to OÜ X: here the unfairness of the term is not evident to the court. Or OÜ X simply does not copy the contract terms into the petition for the payment order: also, here it is not clear to the court that the claim is based on a partially invalid standard term.

The CJEU has explained its views on a similar situation in the cases *Profi Credit Polska S.A (Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016) and *PKO Bank Polski S.A (Powszechna Kasa Oszczednosci (PKO) Bank Polski S.A v. Jacek Michalski*, 2018). The judgment on *Profi Credit Polska S.A.* concerned a situation where a Polish creditor gave a loan to a consumer. The standard-form agreement contained a clause requiring the consumer to issue a promissory note as a security for the creditor's claims for repayment. The promissory note signed by the consumer did not contain a specified amount (*Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016). When the consumer did not return the loan on time, the creditor informed the consumer that it had indicated the outstanding loan amount on the promissory note, and filed a petition for the payment order with a court against the consumer. The creditor appended the promissory note signed by the consumer and the documents regarding the termination of the credit agreement to its petition (*Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016).

The Polish court hearing the matter explained in the reference for a preliminary ruling that, although the standard terms were not included in the documents filed with the court, the court was aware of the fact that the consumer had assumed the obligation to sign the promissory note described above. Pursuant to Polish law, the court is entitled to assess only whether the promissory note meets the formal requirements in the first stage of the order for payment procedure. In the second stage of the procedure, the consumer may file an objection which may concern the issues related to the promissory note as well as the contract due to which the promissory note has been issued, including the potentially unfair nature of such a contract. Differently from the situations in the cases of *Banco Español de Crédito* and *Finanmadrid*, the Polish court could therefore not assess the unfairness of the standard terms based on the documents submitted to it, and the promissory note submitted to the court met all the formal requirements.

Based on the circumstances described, the Polish court filed a reference for a preliminary ruling with the CJEU, asking whether the provisions of national law, enabling the issue of an order for payment based on a formally appropriate promissory note in such a manner that the court conducting the procedure was not able to assess the potential conflict of the terms of the consumer credit agreement underlying the claim with the UCTD, were contrary to the rules of Articles 6 (1) and 7 (1) of the UCTD (*Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016). It is also important to note that under Polish procedural law it is possible to assess the unfair nature of standard terms if the consumer files an objection in the course of the procedure.

Before the respective analysis of the rules, the CJEU underlined the necessity of assessing the procedure as a whole, not only separate provisions, while evaluating the national procedural law (*Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016). Further, the CJEU held that in order to assess whether the contested procedural rules would enable them to ensure effective protection of the consumers' rights, it was to be assessed

whether the rules for submission of an objection as prescribed by national law would create a risk that the consumers might not file objections (*Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016). While analysing the Polish law, the CJEU concluded that such a risk existed, as the conditions of filing an objection were hindering for the consumer – the consumer may file an objection within two weeks, the consumer must also explain in the objection whether he or she objects to the order for payment in full or in part, the consumer must specify why the order for payment should not be issued, and the consumer must present facts and evidence (*Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016). In addition, in case of filing an objection, the Polish consumer is obliged to pay three quarters of the state fee, and the undertaking party has to pay the remaining quarter. The CJEU stated that the obligation to pay the state fee alone, especially in such an amount, may prevent consumers from filing objections (*Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016). Other nuances of the procedure, such as the short term and expense of submitting objections and the consumers' lack of knowledge of their rights, have the same effect (*Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016). In conclusion, the CJEU stated that the national law provisions allowing the issuing of an order for payment on the basis of a promissory note in such a way that the court does not have the opportunity to assess the potentially unfair nature of standard terms, and complicating the submission of objections for consumers, were contrary to the UTCD. The CJEU repeated essentially the same position in its judgment on *Powszechna Kasa Oszczednosci [PKO] Bank Polski S.A. v. Jacek Michalski*, 2018).

Consequently, the CJEU has concluded that if the invalidity of a standard term is not clear to a court, and the court cannot verify the validity of the standard terms of its own motion in the course of the order for payment procedure, the rights of a consumer are still sufficiently protected pursuant to the UCTD if the consumer has the opportunity to file objections in the course of the procedure (*Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016; *Powszechna Kasa Oszczednosci [PKO] Bank Polski S.A. v. Jacek Michalski*, 2018). However, such opportunities for the filing of objections must not intimidate consumers from using the respective opportunity, and after the objections are filed the court of the Member State must have the opportunity to assess the nature of the standard terms. At the same time, the CJEU did not state in these cases that the court of a Member State should have the obligation to require the submission of the documents underlying the claim in case of a suspicion regarding the validity of the standard terms (see e.g. *Powszechna Kasa Oszczednosci [PKO] Bank Polski S.A. v. Jacek Michalski*, 2018).

CJEU altered its position in 2019 in *Profi Credit Polska S.A. (No. 2; Joined cases C-419/18 and C-483/18 Profi Credit Polska S.A.)*, 2019). This case again involved several Polish consumers, who had concluded consumer credit contracts with the creditor under which the payment of the debts was secured by the issuance of an incomplete promissory note. If the consumer failed to comply with their contractual obligations, Profi Credit Polska completed the notes by entering an amount on them, and brought before the court an application seeking the payment of the sum indicated on the promissory note (*Joined cases C-419/18 and C-483/18 Profi Credit Polska S.A.*, 2019). According to Polish law, the court may verify whether the promissory note has been completed in accordance with the agreement concluded only in the event of an objection raised by the debtor (*Joined cases C-419/18 and C-483/18 Profi Credit Polska S.A.*, 2019). In the current case the consumers had not filed an objection. The creditor took the position that they were not obliged to provide any other documentation than the promissory note (*Joined cases C-419/18 and C-483/18 Profi Credit Polska S.A.*, 2019). The referring court was, however, aware of the terms of the credit agreement because one of the defendants in the main proceedings had taken action which allowed the court to see the actual contract (*Joined cases C-419/18 and C-483/18 Profi Credit Polska S.A.*, 2019), and therefore raised serious doubts about the standard terms used being unfair and invalid.

Having these facts in mind, the referring courts asked whether Articles 6 (1) and 7 (1) of the UCTD must be interpreted as meaning that where a national court in the order for payment proceedings has serious doubts as to the merits of and application based on a promissory note, that court must examine of its own motion whether the provisions of the contract are unfair and may require the seller or supplier to produce documents recording those provisions (*Joined cases C-419/18 and C-483/18 Profi Credit Polska S.A.*, 2019). Differently from the previous *Profi Credit Polska S.A.* case, the referring court here stressed its serious doubts about the validity of the terms of the contract underlying the promissory note.

The CJEU took the position that, in case of serious doubts as to the merits of the application, the UCTD requires that the court should be able to ask for documents on which the application is based, including the promissory note agreement (*Joined cases C-419/18 and C-483/18 Profi Credit Polska S.A.*, 2019).

Therefore, the CJEU has clarified its previous positions and stated that even if the invalidity of the standard term is not evident to the court, but the court has serious doubts about the validity of the terms, the court has to have the right to ask for additional documents from the creditor. While doing so the court does not need to wait for the consumer to file an objection.

### 3.2.1.2 European Payment Order

Until December 2019, the CJEU case law on order for payment procedure and on the UCTD discussed only the matters related to Member States' national law. On 19 December 2019, the court made a judgement in *Joined cases C-453/18 and C-494/18 Bondora AS v. Carlos V.C., XY* (2019), where it analysed the national courts' right to request additional information from the creditor relating to the terms of the agreement in order to examine *ex officio* the fairness of the terms of the contract invoked as a basis for European Payment Order (EPO).

The Estonian registered company Bondora AS lodged applications for the EPO before two Spanish courts. As the defendant in both of these cases was a consumer, the courts requested from Bondora AS the loan agreement in order to assess the fairness of contractual terms on which the application for an EPO was made. Bondora AS refused to provide the contract, arguing that Article 7 (2) of EPO regulation (Regulation No. 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure) does not prescribe the creditors the submission of any documentation to issue an EPO. This obligation also does not arise from the Spanish national law regarding the EPO. The Spanish courts, on the contrary, found that they have the power to make such requests.

In light of the previous facts, the CJEU answered the question of whether Article 7 (2) (d) and (e) of the EPO regulation and Articles 6 (1) and (1) of the UCTD must be interpreted as allowing the court in the context of the EPO procedure to request from the creditor additional information relating to the terms of the agreement between the creditor and the consumer, in order to carry out an *ex officio* review of the possible unfairness of those terms (Regulation No. 1896/2006). In its reasoning the CJEU referred to *C-176/17 Profi Credit Polska* and the position stated there: that the national legislation permitting the issue of an order for payment where the court does not have the right to examine the possible unfairness of the terms is not in line with the purposes of the UCTD (Regulation No. 1896/2006). The same principle also applies when a court receives an application for an EPO (Regulation No. 1896/2006). The court's right to request additional documentation from the creditor follows from Articles 7(1) and 9(1) of the Regulation No. 1896/2006. On the basis of this reasoning, the CJEU concluded that the court, in the context of the EPO procedure, is allowed to request from the creditor additional information relating to the terms of the agreement in order to carry out *ex officio* review of the possible unfairness of those terms (Regulation No. 1896/2006).

By this judgement the CJEU seems to have taken another step forward regarding the court's right to *ex officio* examine the possible unfairness of standard terms. If in *Profi Credit Polska S.A. (No. 2; Joined cases C-419/18 and C-483/18 Profi Credit Polska S.A.*, 2019), the CJEU was of the opinion that the ground for requesting additional documentation lies in a court's serious doubt about the standard terms being unfair, then in *Bondora* there is no such limitation mentioned. However, it has to be borne in mind that *Bondora* is a case based on the Regulation No. 1896/2006, and making general assumptions about the Member States' order for payment procedure might therefore be too far reaching. At the same time, it does seem that the two procedures should not differ much with regard to UCTD, as the goal in both cases should be the protection of consumers' rights. Therefore, some conclusions for national order for payment procedures could probably be drawn from the *Bondora* judgement as well.

In this case the CJEU has been of the opinion that the courts have the right to request the contract from the creditor in order to assess the fairness of the terms. There have been opinions expressed that the courts might also be obliged to make such requests from the creditors (Mariottini, 2019). As said before, this obligation is not obvious from the judgement itself, but the reasoning of the judgement definitely leaves room for such interpretation regarding the EPO procedure. Whether a similar obligation would also be applicable in case of national order for payment procedure remains to be seen.

### **3.2.2. Compliance of Estonian Rules on Order for Payment Procedure with CJEU Case Law**

Keeping in mind the judgments regarding Polish law as described above, it should be ascertained, in order to assess whether the Estonian procedural law provisions are in compliance with the Directive, under which conditions consumers have the opportunity to submit objections to a proposal for payment.

Under subsection 485 (1) of the CCIP, a debtor has to file an objection within 15 days after the day of service of the proposal for payment on the debtor. At the same time, the law does not stipulate any specific formal requirements for filing an objection. It is sufficient that the debtor files an objection on the form annexed to the proposal for payment, or in any other form, e.g. in writing or electronically. It is important to note that an objection need not be substantiated (subsection 485 [2] of the CCIP): it is sufficient if the debtor explains in the objection that the debtor does not agree to pay the amount set out in the proposal for payment. Consequently, similarly to the Polish system for the order for payment, the Estonian consumers also have the opportunity to file an objection within a relatively short time frame (the time limit of 15 days for the filing of objections has been deemed to be too short by the CJEU, for example in the case *EOS KSI Slovensko s.r.o v. Jan Danko, Margarita Dankova*, 2018, although this was in a situation where the consumer had to substantiate their objection. See also the European Commission, 2019, p. 66). However, differently from the Polish procedure, the Estonian consumers need not substantiate the objection or to prove any circumstances which constitute a basis for filing the objection (it has been concluded with regard to German law, for example, that the time limit of two weeks for filing of objections is in compliance with the principle of effective protection of rights deriving from the UCTD, if the consumer is not required to use the assistance of attorneys for filing of the objection, or to incur any related expenses, see EuGH, 2012).

Also, with regard to the payment of state fee, Estonian law is more beneficial to consumers than the respective provisions of Polish law. It is provided for in subsection 147 (5) of the CCIP that, upon change of the order for payment procedure into action, a supplementary state fee is paid on the action to the extent that is not covered by the state fee paid on the filing of a petition for the payment order. The missing part of the state fee is to be paid by the creditor, not by the consumer (Köve et al., 2018, p. 201). In the case of Paul and OÜ X, OÜ X claims payment of €1306 from Paul. The full rate of the state fee for the given value of civil matter is €200 (State Fees Act, passed on 10 December 2014, entry into force on 1 January 2015, partially from 1 January 2018. Annex 1 'State Fee Rates for Filing of Petitions in Judicial Proceedings (in euros)'), of which €45 had to be paid by OÜ X already upon filing the petition for the payment order (the state fee for filing a petition for the payment order is 3% of the claim, but not less than €45).

In conclusion, the conditions for the filing of an objection in the course of the order for payment procedure are significantly less burdensome for Estonian consumers than under the Polish law. However, it cannot be clearly concluded that Estonian procedure is in compliance with the requirements of the UCTD in this respect. Firstly, Estonian consumers have only one more day to file objections than the Polish consumers. Secondly, there is still a considerable risk that the consumers will not file objections as they are not aware of their right to file objections, do not understand its importance in the course of the procedure, or are not able to do it due to the lack of evidence submitted by the petitioner (these are the risks referred to by the Court of Justice in its judgment *Profi Credit Polska S.A. w Bielsku Bialej v. Mariusz Wawrzosek*, 2016). The Estonian court has to inform the consumer, while making the proposal for payment, that the consumer has 15 days to file an objection (clause 484 [2] 3) of the

CCIP),<sup>4</sup> and the court also attaches the form for filing an objection to the proposal for payment, where the conditions for and consequences of filing an objection are explained. This should be sufficient for the consumer to understand the importance of filing an objection and the consequences of filing or not filing an objection (it is still questionable whether the explanations provided on the document are clear enough and sufficiently understandable for the average consumer to decide upon the filing of the objection). However, for as long as there is no judgment of CJEU which would explain the same issues as are covered by the Estonian rules, or EU legislation regulating the issue, it cannot be regarded to be absolutely certain. This is also suggested by the fact that, despite the simplicity of the procedure of filing an objection, debtors do not file objections actively in Estonia (Kõve et al., 2018, p. 191). The situation with the submission of objections is also similar in other EU Member States (European Commission, 2019, p. 226; Rott, 2012, p. 474).

If the order for payment procedure continues as an action after the filing of an objection, the court hearing the matter must provide the petitioner the opportunity to file a claim and substantiate it in the form prescribed for a statement of claim (subsection 487 [1] of the CCIP). The statement of claim must clearly indicate the amount of the claim and also the factual circumstances underlying the claim (§ 363 of the CCIP). In addition, the evidence in proof of the circumstances underlying the action shall be appended to the statement of claim. This means that the creditor must also file with the court the contract constituting the basis for the claim: here is really the first chance for the court to assess the potentially unfair nature of a standard term.

However, considering that the filing of an objection is not very burdensome for the consumer, it can be concluded that the rules of the order for payment procedure of Estonia are in compliance with the CJEU case law in situations where the unfairness of a standard term is not obvious to the court.

On the other hand, the situation is different in cases where the court has serious doubts about the validity of standard terms. As was described previously regarding *Profi Credit Polska S.A. (No. 2; Joined cases C-419/18 and C-483/18 Profi Credit Polska S.A., 2019)*, in this situation court has to have a right to ask for additional documents from the creditor. The CCIP does not foresee such a right for the court. The Estonian order for payment procedure is formalised in a way that there has been no opportunity left for the court to ask the creditor for any additional evidence. The court has a chance to see the documents that form the basis of the claim only when the consumer has filed an objection. This contradiction between the regulation of the CCIP and the UCTD cannot be eliminated by interpreting the CCIP in light of the UCTD. The regulation on the order for payment procedure in the CCIP simply does not include an article that would allow for such an interpretation. Therefore, there is a need for the Estonian legislator to amend the order for payment procedure rules of the CCIP so that they would allow the court, in cases of serious doubts about the validity of standard terms, to order the creditor to submit additional evidence in the form of the contract that is the basis for the creditor's claim.

In the light of the recent *Bondora* case, the court's right to ask for additional evidence might be even broader, meaning that the court should have such a right already when the credit contract is concluded between the creditor and the consumer and the court does not need to have any doubts about the fairness of the terms being used (see 4.2.1.2). However, it has to be borne in mind that in *Bondora* the CJEU was analysing the Regulation No. 1896/2006 and did not directly address the matters of national order for payment procedures. Therefore, it might be too early to make such a conclusion.

As a conclusion to the previous discussion, the Estonian legislator should consider adding a paragraph to CCIP § 483 stating that in case of a claim made by the seller or supplier arising from a consumer contract, the court has a right to demand submission of evidence in order to assess the possible unfairness of standard terms. The court's right could be limited to cases where the court has serious doubts about the fairness of terms being used. This would keep the regulation of the CCIP in line with the practice of the CJEU. For granting even stronger protection to the consumers, the court's right should not be limited only to cases of serious doubt.

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<sup>4</sup> The consequence of filing an objection is that the hearing of the matter will continue by contentious proceedings which means that the court will also be obliged to assess the substance of the claim (CCIP § 483 [1]).

## Conclusions

The first CJEU judgments concerning the possibility for a court to assess, *ex officio*, the unfair nature of standard terms in the order for payment procedure were already made several years ago. In the light of these judgments, Estonian legislators have introduced minor amendments to the CCIP, allowing the assistant judge who carries out the order for payment procedure to review, *ex officio*, only the arrangements concerning penalties for late payment contained in the standard terms of a consumer contract. Other standard terms' unfairness can be assessed by Estonian courts only in cases where the assistant judge refers the making of a ruling on the matter to the judge under clause 595 (2) 3) of the CCIP. Consequently, pursuant to Estonian law, in case a standard term is evidently unfair and invalid, then in the course of the order for payment procedure the court has the opportunity to assess the unfairness of standard terms *ex officio* already, before making the proposal for payment. The respective regulation is in compliance with the positions of the CJEU expressed in the judgments on *Banco Español de Crédito SA* and *Finanmadrid*.

If the unfair nature of a standard term is not immediately clear to a court and the court does not have serious doubts about the validity of contractual terms, the rules of the CCIP are also in compliance with the requirements specified by the CJEU in the cases *Profi Credit Polska S.A.* and *PKO Bank Polski S.A.*, and need not be changed. The reason behind this is that it is relatively easy for the consumer to file an objection to the claim.

However, in light of the positions of the CJEU in case *Profi Credit Polska S.A. (No. 2)*, the CCIP needs to be amended. According to this ruling of the CJEU, in case of serious doubts about the validity of a standard term based on which the claim is made the court should have a right to ask for the relevant documents (the contract) from the creditor. At the moment, the CCIP does not foresee such a right for the court, and this gap cannot be overcome by interpreting the CCIP in line with the UCTD. The rules of the CCIP should be amended so that the court would have a right to ask for the documentation based on which the claim is made in the course of order for payment procedure.

In the absence of the above, the order for payment procedure would not very effectively ensure the protection required under the UCTD. Namely, the petitioners almost never submit a contract or a specific condition underlying their claim to the court in their petition for the payment order. Furthermore, it does not derive from the CCIP that the court should require the petitioner to submit any documents proving the claim (even if in doubt about the fairness of terms being used). Also, the CJEU has not clearly found that the court should demand submission of the terms in order to determine potential invalidity of a standard term (see 4.2.2). Therefore, in many, if not most cases the potential unfairness would not be clear to an assistant judge, which in turn does not enable them to refer the making of the ruling to the judge. There is also very limited possibility for the court to develop serious doubts about the validity of standard terms being used by the creditors as the contract is simply not available to the court. Consequently, Estonian judges have no opportunity to assess, *ex officio*, the potentially unfair nature of the standard terms, and the consumer will be ordered to pay an amount of money based on an invalid standard term. This means that a seller or supplier may, in order to escape the review of the substance of the standard terms, find it expedient to assert its claims by the order for payment procedure instead of ordinary action. The Estonian experience shows further that the effective protection of consumers' rights is hindered by the fact that, under the existing CJEU practice, the court does not have to demand submission of evidence, and sellers or suppliers can thus avoid the unfairness control of the standard terms very easily by not appending the respective evidence to the petition. Therefore the situation in Estonia could be improved by giving the court the right to demand submission of evidence even if it does not have serious doubts about the validity of the terms being used. In addition, the Estonian legislator should introduce a clear rule to CCIP § 483 (2) stating that the court, by order, denies a petition in expedited procedure for payment if the claim against a consumer arising from a consumer contract is based on an unfair contract term. This would grant the consumer the desired high level of protection and also make the procedural rules more unambiguous.

In the light of the above, the current initiative in Estonia to make the order for payment procedure even more automated and left to artificial intelligence is not to be welcomed. It is certainly not just a post office duty, where

no justice has to be administered. Rather, according to the CJEU case law, the trend should be towards more thorough, substantive analysis of the claim in the order for payment procedure.

## References

- Beka, A. (2018). *The active role of courts in consumer litigation. Applying EU law of the national courts' own motion*. Intersentia. <https://doi.org/10.1017/9781780687674>
- Case C-137/08 VB Pénzügyi Lízing Zrt v. Ferenc Schneider (2010). ECLI identifier: ECLI:EU:C:2010:659.
- Case C-176/17 Profi Credit Polska S.A. w Bielsku Białej v. Mariusz Wawrzosek (2016). ECLI identifier: ECLI:EU:C:2018:711.
- Case C-243/08 Pannon GSM Zrt v. Erzsébet Sustikné Győrfi (2009). ECLI identifier: ECLI:EU:C:2009:350.
- Case C-448/17 EOS KSI Slovensko s.r.o v. Jan Danko, Margarita Dankova (2018). ECLI identifier: ECLI:EU:C:2018:745.
- Case C-49/14 Finanzmadrid EFC SA v. Jesús Vicente Albán Zambrano and others (2016). ECLI identifier: ECLI:EU:C:2016:98.
- Case C-618/10 Banco Español de Crédito SA v. Joaquín Calderón Camino (2012). ECLI identifier: ECLI:EU:C:2012:349.
- Case C-632/17 Powszechna Kasa Oszczędności (PKO) Bank Polski S.A v. Jacek Michalski (2018). ECLI identifier: ECLI:EU:C:2018:963.
- Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts. (1993). *Official Journal of the European Communities*, L95, 29–34. <http://data.europa.eu/eli/dir/1993/13/oj>
- Courts Act, passed on 19 June 2002, entry into force on 29 July 2002. <https://www.riigiteataja.ee/en/eli/505122017002/consolide>
- Ebers, M. (2010). ECJ (First Chamber) 6 October 2009, Case C-40/08, Asturcom Telecomunicaciones SL v. Cristina Rodríguez Nogueira – From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata. *European Review of Private Law*, 18(4), 823–846. <https://dx.doi.org/10.2139/ssrn.1709347>
- EuGH. (2012). Verbraucherrecht: Prüfung missbräuchlicher Klausel im Mahnverfahren und geltungserhaltende Reduktion. *Europäische Zeitschrift für Wirtschaftsrecht*, 23(19), 754–759.
- European Commission. (2017). *An evaluation study of national procedural laws and practices in terms of their impact on the free circulation of judgements and on the equivalence and effectiveness of the procedural protection of consumers under EU consumer law. Strand 2. Procedural Protection of Consumers*. European Commission. [http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc\\_id=49503](http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49503)
- European Commission. (2018). *Review of EU consumer law – New deal for consumers*. European Commission. [https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers\\_en](https://ec.europa.eu/info/law/law-topic/consumers/review-eu-consumer-law-new-deal-consumers_en)
- European Commission. (2019). Commission notice – Guidance on the interpretation and application of the Council Directive 93/13/EEC of 5 April 1993 on unfair contract terms in consumer contracts. *Official Journal of the European Union*, C 323. [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C\\_.2019.323.01.0004.01.ENG](https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.323.01.0004.01.ENG)
- Joined cases C-419/18 and C-483/18 Profi Credit Polska S.A. (2019). ECLI identifier: ECLI:EU:2019:930.
- Joined cases C-430/93 & 431/93 Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten (1995). ECLI identifier: ECLI:EU:C:1995:441.
- Joined cases C-453/18 and C-494/18 Bondora AS v. Carlos V.C, XY (2019). ECLI identifier: ECLI:EU:C:2019:1118.
- Judgment of the Civil Chamber of the Supreme Court of 10 May 2016, No. 3-2-1-25-16 (2016)
- Judgment of the Civil Chamber of the Supreme Court of 26 June 2014, No. 3-2-1-153-13, p 59 (2014b).
- Judgment of the Civil Chamber of the Supreme Court of 3 December 2014, No. 3-2-2-2-14 (2014c).
- Judgment of the Civil Chamber of the Supreme Court of 4 February 2014, No. 3-4-1-29-13, p 44.6 (2014a).
- Justiitsministeerium. (2018). *Esimese ja teise astme kohtute menetlusstatistika 2018.a. koondandmed*. [https://www.kohus.ee/sites/www.kohus.ee/files/elfinder/dokumendid/i\\_ja\\_ii\\_astme\\_kohtute\\_2018.\\_a\\_statistilised\\_koondandmed.pdf](https://www.kohus.ee/sites/www.kohus.ee/files/elfinder/dokumendid/i_ja_ii_astme_kohtute_2018._a_statistilised_koondandmed.pdf)
- Kalamees, P., & Sein, K. (2017). Case law of the Court of Justice of European Union on unfair contract terms directive: Implications on Estonian domestic law. *International Comparative Jurisprudence*, 3(1), 115–131. <https://doi.org/10.13165/j.icj.2017.03.010>
- Kõve, V. (2012). Tsiviilkohtumenetluse kiirendamise võimalused ja nendega seotud ohud. *Juridica*, 9, 659–676.
- Kõve, V., Järvekülg, I., Ots, J., & Torga, M. (Eds.). (2010). *Tsiviilkohtumenetluse seadustik II. VI – X osa [Code of Civil Procedure Book 2. Part 6-10]*. Juura.
- Kõve, V., Järvekülg, I., Ots, J., & Torga, M. (Eds.). (2018). *Tsiviilkohtumenetluse seadustik III [Code of Civil Procedure Book 3]*. Juura.

- Law of Obligations Act, passed on 26 September 2001, entry into force on 1 July 2002. <https://www.riigiteataja.ee/en/eli/507032019001/consolide>
- Mandri, J.-M. (2019, April 1). Kohtunikud saavad robotabilised: riik otsib võimalusi kohtusüsteemis tehisintellekti rakendamiseks [Judges are becoming robotic assistants: the state is looking for ways to apply artificial intelligence in the judiciary]. *Delfi.ee*. <https://forte.delfi.ee/news/digi/kohtunikud-saavad-robotabilised-riik-otsib-voimalusi-kohtususteemis-tehisintellekti-rakendamiseks?id=85777829>
- Mariottini, C. (2019, December 27). Consumers' rights strike back! First impressions on C-453/18 and C-494/18 – Bondora. *Conflict of Laws*. <http://conflictoflaws.net/2019/consumers-rights-strike-back-first-impressions-on-c-453-18-and-c-494-18-bondora/>
- Musielak, H.-J., & Voit, W. (2019). *Zivilprozessordnung: ZPO* (16th ed.). Vahlen.
- Regulation No 1896/2006 of the European Parliament and of the Council of 12 December 2006 creating a European order for payment procedure. *Official Journal of the European Communities*, L399, 1–32. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2006:399:TOC>
- Rösler, H. (2012). *Europäische Gerichtsbarkeit auf dem Gebiet des Zivilrechts Strukturen, Entwicklungen und Reformperspektiven des Justiz- und Verfahrensrechts der Europäischen Union [European Judiciary in the Field of Private Law. Structures, Developments and Reform Perspectives of the Judicial and Procedural Law of the European Union]*. Mohr Siebeck.
- Rott, P. W. (2012). Case note on Banco Español de Crédito SA v. Joaquín Calderón Camino. *European Review of Contract Law*, 8(4), 470–480. <https://doi.org/10.1515/ercl-2012-1005>
- Sein, K. (2013). Protection of consumers in consumer–credit contracts: Expectations and reality in Estonia. *Juridica International*, 20, 32–40.
- State Fees Act, passed on 10 December 2014, entry into force on 1 January 2015, partially from 1 January 2018. <https://www.riigiteataja.ee/en/eli/504062019005/consolide>
- State Fees Act, passed on 10 December 2014, entry into force on 1 January 2015, partially from 1 January 2018. Annex 1. State Fee Rates for Filing of Petitions in Judicial Proceedings (in euros). <https://www.riigiteataja.ee/akti/190/3201/9042/lisa1.pdf#>
- Tarbijakaitseamet. (2018). *Tarbijavaidluste komisjoni 2017. Aasta tegevusaruanne aruanne [Consumer Disputes Commission 2017. Annual activity report]*. [https://komisjon.ee/sites/default/files/tvk\\_2017\\_aruanne.pdf](https://komisjon.ee/sites/default/files/tvk_2017_aruanne.pdf)
- Tesla Rent. (n.d.). *Terms & Conditions*. Retrieved 4 September 2019. <https://teslarent.eu/tingimused/>
- The Code of Civil Procedure, passed on 20 April 2005, entry into force on 1 January 2006. <https://www.riigiteataja.ee/en/eli/503022016003/consolide>
- Traffic Act, passed on 17 June 2010, entry into force on 1 July 2011. <https://www.riigiteataja.ee/en/eli/525032019002/consolide>
- Trstenjak, V. (2013). Procedural aspects of European consumer protection law and the case law of the CJEU. *European Review of Private Law*, 21(2), 451–478.
- van Duin, A., & Leone, C. (2019). The real (new) deal: Levelling the odds for consumer-litigants on the need for a modernisation, part II. *Amsterdam Law School Research Paper No. 2019-24*. [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3418275](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3418275)
- Varul, P., Kull, I., Kõve, V., Käerdi, M., & Sein, K. (2016). *Võlaõigusseadus I [Law of Obligations Act I. Annotated version]*. Juura.